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BULLETIN

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Subject: WINDSTORM DAMAGE SETTLEMENTS AND RELATED CONCERNS

Attention: Property and Casualty Insurers

Insurance agents have contacted us indicating a problem because they have not received essential information from their companies so that proper advice may be given to insureds about coverage of losses under homeowners insurance policies, as a result of damage from the recent windstorm.

It is imperative that insurers communicate their positions as to coverage with respect to such claims. Those companies that have not yet provided written instructions and advice to their agents and adjusters should do so forthwith.

In particular, we believe that the various situations which exist because of loss or damage from falling trees must be carefully explained in accord with the insurer's contract. Such situations should include:

(1) Damage from trees hitting the insured house or structure. We believe this damage is covered whether or not the tree was the homeowner's. Debris removal is also covered, probably subject to monetary limits.

(2) Damage from a tree partially uprooted by the windstorm hanging over the house and threatening to fall. We believe this is a covered loss. Certainly if the house is unsafe, *i.e., not fit to live in*, loss of use of tangible property has occurred which is, by definition, *property damage*. Thus, the insurer is obligated to provide such additional living expenses as are necessarily incurred by the family, plus the costs incurred by the insured in taking necessary measures—*e.g., removal of the tree—to protect against further damage.*

(3) Damages resulting from power outages caused by the windstorm, such as food spoilage and evacuation of the family to a hotel for lack of heat. We believe these losses are covered, notwithstanding the usual provision purporting to deny coverage for losses resulting from power failure if the failure takes place away from the residence premises.

Since Graham v. Pemco, 98 Wn.2d 533, insurers have been subject to a rule that looks to the "efficient proximate cause" of an event to determine whether there is coverage in insurance cases. In McDonald v. State Farm, 119 Wn.2d 724 (1992), our Supreme Court repeated the rule:

The efficient proximate cause rule states that where a peril specifically insured against sets other causes into motion which, in

an unbroken sequence, produce the result for which recovery is sought, the loss is covered, even though other events within the chain of causation are excluded from coverage. . . . [Citing Graham.] "Stated in another fashion, where an insured risk itself sets into operation a chain of causation in which the last step may have been an excepted risk, the excepted risk will not defeat recovery." [Vilarella, 106 Wn.2d 806.] The rule was later reaffirmed in Safeco . . . v. Hirschmann, 112 Wn.2d 621

The January storm gave us many examples of losses caused by a covered peril--the windstorm. As in the Hirschmann and Vilarella cases, we think the efficient proximate cause rule controls so that an excepted risk, such as power failure off of the premises, will not defeat recovery with respect to such losses as food spoilage or additional living expenses.

A few insurers have expressed concern that they might be charged with rebating or illegal inducements should they provide benefits that are later found to have been beyond the scope of the contract. Similarly, they do not want an excessively liberal interpretation to constitute a precedent that must be followed in future situations.

We believe their concerns are unwarranted. First, in situations where there may be some doubt as to whether a claim should be paid, we believe it could be paid in the spirit of compromising an uncertain or disputed claim. Indeed, the threat of a bad faith suit in view of the uncertainties of the contract should justify payments by insurers.

Secondly, the language of the current homeowners policies is obviously in need of improvement. Too many questions cannot be answered by simply reading the policy. Companies need to accept the well understood decisions issued by our Courts, and move to amend their policies to conform to the efficient proximate cause rule. While the facts of this catastrophe are clear in our minds, you should redraft the forms. When that is done, there will no longer be the contract to which any precedents now being set would apply. My office stands ready to assist you in the improvement of the homeowners forms.

Finally, we appreciate the generally excellent responses the insurers and their representatives are making to the many victims of the January storm. Insurance companies seldom look better than when they are responding to a catastrophe.

DEBORAH SENN
Insurance Commissioner